IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated, Plaintiffs, v. R.J. REYNOLDS TOBACCO COMPANY, *et al.*, Defendants.	)	Civil Action No. 1:02 CV 00373

DEFENDANTS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

Pursuant to Local Rule 7.3(i), as an addendum to Defendants' Memorandum in Opposition to Plaintiff's Motion to Amend Under Fed. R. Civ. P. 15(b)(2) [#366], Defendants submit as subsequently decided authority the following legal authorities:

(1) *Dank v. Shinseki*, No. 09-1009, 2010 WL 1500524 (4th Cir. Apr. 15, 2010) – the *Dank* opinion, attached hereto as Exhibit 1, supports the proposition that a defendant is prejudiced by a plaintiff's motion to amend under Rule 15(b)(2) of the Federal Rules of Civil Procedure where the proposed new claim has a different legal standard than the claim previously asserted because "[t]he proof required to defend against this new claim would be of an entirely different character than the proof which the defendant had been led to believe would be necessary";

(2) *Halpern v. Wake Forest University Health Sciences*, 1:09-CV-474 (M.D.N.C. July 1, 2010) (Auld, Mag. J.) – the Memorandum Opinion and Order in *Halpern*,

attached hereto as Exhibit 2, supports the proposition that amendment in the late stages of litigation is improper where a plaintiff seeks to add a new claim based on a separate section of a federal statute that would require additional discovery;

(3) *Trim Fit, LLC v. Dickey*, __ F.3d __, 2010 WL 2244388 (8th Cir. June 7, 2010) – the *Trim Fit* opinion, attached hereto as Exhibit 3, supports the proposition that a motion to amend to conform to the evidence at trial under Rule 15(b)(2) to add a new legal claim should be denied where additional evidence would be required and, as a result, the opposing party would be prejudiced;

(4) *Kansas City Southern Railroad Co. v. Borrowman*, No. 09-3094, 2010 WL 2178699 (C.D. Ill. May 28, 2010) – the *Borrowman* opinion, attached hereto as Exhibit 4, supports the proposition that a defendant does not consent, either expressly or impliedly, to the trial of unpleaded issues under Rule 15(b)(2) of the Federal Rules of Civil Procedure but, instead, is not afforded a "fair opportunity" to defend against the new claim, when the evidence admitted that supports the unpleaded claim is also relevant to a pleaded claim; and

(5) *McElgunn v. Cuna Mutual Insurance Society*, __ F. Supp. 2d __, 2010 WL 1141519 (D.S.D. Mar. 22, 2010) – the *McElgunn* opinion, attached hereto as Exhibit 5, supports the proposition that a party does not consent, either expressly or impliedly, to the trial of unpleaded issues under Rule 15(b)(2) of the Federal Rules of Civil Procedure when evidence admitted that supports the unpleaded issue is also relevant to a pleaded issue.

This the 7th day of July, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2010, I electronically filed the foregoing

DEFENDANTS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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